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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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09/815,336

03/23/2001

Anthony Nicolas Kalloo

2784-25

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12/27/2007

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EXAMINER

SHAY, DAVID M

ART UNIT

PAPER NUMBER

3735

MAIL DATE

DELIVERY MODE

12/27/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Advisory Action  
Before the Filing of an Appeal Brief**

Application No.

09/815,336

Applicant(s)

KALLOO ET AL.

Examiner

david shay

Art Unit

3735

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED November 26, 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. No event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) the date set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☒ The Notice of Appeal was filed on October. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because:  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling non-allowable claim(s).  
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: \_\_\_\_\_.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.  
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_  
13. ☐ Other: \_\_\_\_\_

DAVID M. SHAY  
PRIMARY EXAMINER



Continuation of 11. does NOT place the application in condition for allowance because: Applicant argues that the combined teachings of Wilk and McNeely do not render the claims obvious. The examiner must respectfully disagree. While Wilk does not pass the distal end of the flexible conduit through the stomach wall as part of the sealing process; this is clearly taught by McNeely in Figure 1 thereof, for example, thus the absence of this feature in Wilk does not render the claims patentable over the combination. It is further noted that the passage of the flexible conduit does not appear to be critical to the invention, as the paragraph spanning pages 6 and 7 of the original filed disclosure clearly identifies this feature as "exemplary" and simply desires to "provide a continuous path to and into the peritoneal cavity and to isolate the peritoneum from the gastric cavity". However, even if this were not the case (which the examiner maintains it is), the method of Wilk also involves the perforation of the wall of the colon, with the subsequent insertion of an endoscope guide tube therethrough, as one having ordinary skill in the art would readily understand, this opening also would require sealing, to prevent contamination of the peritoneum; and this aspect of the Wilk method, in combination with McNeely would also render the claims obvious. With respect to claims 13 and 15, while neither of Wilk and McNeely may provide the recited structure, it is the examiner's view that the combination does. Wilk discusses visualization of the tissues, and one having ordinary skill will readily appreciate that the use of the needle of McNeely under endoscopic guidance would be vastly preferable to blindly hacking away at the peritoneal tissues with the needle of McNeely, which is considered a needle-knife as claimed. Applicant's assertion that the dilation balloon is not on the conduit of the needle knife is clearly erroneous in view of the disclosure at column 5, line 2 to column 6, line 52 and Figures 3-8. With regard to the structure argued by applicant, it is further noted that the instant method claims cannot distinguish over the applied art by virtue of structure alone, but that structure must manipulatively affect the claimed method (Ex Parte Pfeiffer 135 USPQ 31, 33 (Bd. Pat. App. & Int. 1961)).